United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 26, 1996

TO : Peter B. Hoffman, Regional Director
Region 34

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Teamsters Local 1150 (Sikorsky Aircraft) 536-2554
Cases 34-CB-1924, 1927 536-2581-3307
536-2581-6767-7600

Sikorsky Aircraft
Case 34-CA-7208

These Section 8(b)(1)(A) and (2) and Section 8(a)(3) cases were submitted for advice as to whether (1) the Employer unlawfully discharged an employee, pursuant to an unlawful Union demand, because the Union failed to provide him with adequate notice of a dues delinquency under Philadelphia Sheraton Corp.,[1] and (2) the Union's financial disclosure to objecting nonmembers is inadequate under CWA v. Beck, 487 U.S. 735 (1988).

I. Philadelphia Sheraton Allegation

Facts

The current contract between the Employer and Union contains, for the first time, a union security clause conditioning continued employment on full Union membership or on payment of an agency fee to the Union. The clause further provides that the Union will notify employees delinquent in dues payments by certified mail and given 15 days to cure the delinquency or be discharged.

Charging Party Dalonzo was a Union member until he resigned in early 1993 and began to pay an agency fee in

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[1] 136 NLRB 888 (1962), enfd. sub nom. NLRB v. Hotel & Restaurant Employees Local 568, 320 F.2d 254 (3d Cir. 1963). The employee's request for Section 10(j) relief because his "discharge... will chill other employees from exercising their rights under the Act to become Beck objectors" will be addressed in a separate memorandum.

person at the Union hall in February 1993.[2] Dalonzo claims that in 1993, the Union sent him, at most, three or four separate delinquency notices by certified mail threatening discharge if the fee was not paid by the stated deadline. He also received a Beck notice in April 1993. According to the Union, delinquency notices were sent to him each month from April 1993 through March 1994, and has produced 7 certified receipts. In April 1994, the Union sent Dalonzo a letter, returned "unclaimed," stating he would no longer receive certified individual delinquency letters, and attached a fee schedule setting forth monthly dues obligations for April 1994 -- March 1995.[3] In April 1995, the Union sent all agency fee payers such schedules for that month through March 1996, stating that fees are due by the 15th of each month and that employees whose fees were not "received" by the 30th of the month ("final due date") will be terminated. However, Dalonzo claims, and the Union has presented no contrary evidence, that he never received the 1995 schedule. He further asserts that he never saw the schedule, although copies are posted by the timeclock and elsewhere in the Employer's facility. In any event, from April 1994 through July 1995, the Charging Party or his girlfriend timely paid his agency fee.

On about August 16, 1995, Dalonzo gave his girlfriend $30 to go to the Union hall and pay his approximately $28 agency fee, and went on vacation until August 28 assuming that she had paid the fee by the August 30 final due date. She had not and, on August 31, the Charging Party was discharged pursuant to the Union's request for his termination based on his failure to pay the agency fee.[4]

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[2] Since August 1994, Dalonzo's girlfriend has paid his fee in person at the Union hall.

[3] This letter and fee schedule, allegedly sent to all agency fee payers, clearly communicated the amount owed each month, the method used to compute delinquencies, and a schedule of original and final due dates through March 1995.

[4] When the Employer informed the Charging Party that he was discharged because the Union had requested his termination due to his failure to pay his agency fee, Dalonzo merely said, "You have to be kidding me." The Employer official

The Union rejected Dalonzo's proffered excuse and offer to pay the August fee. The Union told Dalonzo that he had been discharged in accordance with the contract.

The Union contends that its conduct was privileged because Dalonzo had received numerous dues delinquency notices in 1993 and 1994, as well as the April 1994 letter and payment schedule for the next 12 months, stating that it would no longer send him certified letters reminding him of his delinquency status. The Union argues that the publication of this schedule satisfies its Philadelphia Sheraton notice obligations to habitual late fee payers, and that this case is similar to the dismissed ULP charges involving the June 2, 1994 discharge of employee Coma, who also had a record of delinquent fee payments.[5]

Action

We conclude, in agreement with the Region, that complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(1)(A) and (2) by causing the Charging Party's discharge without first notifying him of his agency fee delinquency, and that the Section 8(a)(3) charge should be dismissed, absent withdrawal.

In Philadelphia Sheraton, the Board held that a union seeking to enforce a union security clause has the duty to apprise employees of their financial obligations, i.e. the amount of dues and the time when such payments must be made, prior to demanding their discharge for non-payment of regular dues and fees. 136 NLRB at 896. Thus, before seeking discharge, the Union is required to give prior adequate notice of the dues delinquency and a reasonable

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said he hoped a mistake had been made and escorted Dalonzo out of the building.

[5] Coma had received the April 1994 letter, paid his April dues by the scheduled "final due date," but then failed to pay his May dues and was discharged pursuant to the Union's request. In agreeing with the Region that the Union's conduct was privileged, the Office of Appeals considered all the circumstances, "including Mr. Coma's admitted knowledge of the amount of fees owed, his admitted failure to make timely payment of his May fee, and the absence of any question as to the calculation of the dues...."

opportunity to pay the arrearage. The Board has consistently refused to sanction employee discharges for non-payment of dues "unless as a practical matter the union has taken the necessary steps to make certain that a reasonable employee will not fail to meet his membership obligation through ignorance or inadvertence but will only do so as a matter of conscious choice."[6] Actual, as opposed to constructive, notice of any financial obligations/delinquencies must be given prior to a request for discharge "absent extenuating circumstances,"[7] and the Board has specifically held that posting a list of those delinquent in their dues at the employer's facility does not fulfill a union's Philadelphia Sheraton obligations, at least where non-paying members credibly deny ever seeing such schedules.[8]

Here, although the Union arguably informed Dalonzo of his dues obligation,[9] the Union admits it never informed him of his delinquency or gave him an opportunity to pay the dues. Moreover, while Dalonzo had been chronically delinquent in making dues payments prior to April 1994, his monthly payments had been timely submitted since then until August 1995. This record, combined with Dalonzo immediately informing the Union of the circumstances surrounding the failure to make his August payment by the

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[6] Conductron Corp., 183 NLRB 419, 426 (1970). See also Western Publishing Co., 263 NLRB 1110, 1113 (1982), and cases cited therein. Cf. Big Rivers Electric Corp., 260 NLRB 329 (1982) (union's failure to comply with notice requirements lawful upon showing that employee willfully and deliberately sought to avoid union security obligations).

[7] Machinists District 9 (Marvel-Schebzer), 237 NLRB 1278, fn. 2 (1978), and cases cited; Coopers NIU (Blue Grass), 299 NLRB 720, fn. 2 (1990).

[8] Boilermakers, Local Lodge 732 (Triple A South), 239 NLRB 504, 505 (1978).

[9] The notice of dues schedule informed employees of the amount due and when the dues had to be paid.

final due date, clearly establishes that he inadvertently failed to meet, rather than consciously or willfully attempted to avoid, his union security obligation. Accordingly, the Union was not justified in seeking and obtaining the Charging Party's discharge prior to giving him actual notice of the August 1995 dues delinquency, and thereby violated Section 8(b)(1)(A) and (2).

We further agree with the Region that this case is distinguishable from the charges involving employee Coma's discharge in that Coma actually received the April 1994 letter, admittedly knew the amount of fees owed, and admittedly failed to make or attempt to make the May 1994 payment. Finally, we agree with the Region that there is insufficient evidence that the Employer had reason to be suspicious of the validity of the Union's demand that Dalonzo be discharged under the union security clause.[10] Thus, the Employer was unaware of the Union's unlawful failure to actually inform Dalonzo of his August delinquency prior to seeking his discharge and, when it informed the Charging Party of his termination, Dalonzo merely responded, "You have to be kidding me." Therefore, the Employer did not unlawfully discharge Dalonzo at the Union's request.

II: Beck Allegation

The Union treats all agency fee payers as Beck objectors and, in February or March of 1995, sent them an audited statement disclosing how its 1994 expenses were allocated between chargeable and non-chargeable activities. Charging Party Mejia, on behalf of himself and 45 similarly situated employees, alleges that the disclosure fails to fulfill the Union's Beck obligations in several ways, discussed below. We conclude that a Section 8(b)(1)(A) complaint should issue, absent settlement, alleging only that the disclosure does not provide any statement regarding expenditures of Union affiliates to which the Union sends a portion of dues receipts. All other allegations should be dismissed, absent withdrawal.

A. Disclosure "subject to review." All ten pages of the audited disclosure are marked "tentative report subject

[10] See Western Publishing Co., 263 NLRB 1110, 1113 (1982); R.H. Macy & Co., 266 NLRB 858, 859 (1983).

to review" and, although it was again reviewed by an independent accountant who made no changes after it was mailed to the agency fee payers, the Union failed to so inform them. However, there is no merit to the Charging Party's allegation that the Union's disclosure is thereby deficient because it does not represent a final report verified by an independent auditor and leaves objectors without the certainty of figures necessary "in making challenges of the fee." The Board recently, in California Saw & Knife Works, agreed with the Second Circuit that under the Act, "*Hudson* requires only that the usual function of an auditor be performed, i.e. to determine that the expenses claimed were in fact made."[11] Here, the disclosure actually included a letter from an outside auditor, as well as a breakdown of major Union expenses based on which an informed challenge could be made, and there is no evidence that if the "final" report had been different, the Union would not have permitted a challenge as untimely. We further note that the "tentative" report was not changed and there is no evidence that objectors failed to file timely challenges or that the Union refused to accept belated challenges because of confusion arising from this language. Accordingly, this allegation should be dismissed, absent withdrawal.

B. Failure to provide financial disclosure of affiliates. The Union's disclosure sets forth the amounts of dues sent to affiliates and a breakdown of its affiliates' total representational and non-representational expenses. However, the Union provided no disclosure of how Teamsters affiliates spent agency fee monies. The General Counsel has taken the position that such disclosure is necessary so that objectors can make informed decisions on whether to challenge the allocation of *per capita* payments to affiliates of the Section 9(a) representative.[12] Moreover, the Board recently indicated that this is one of

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[11] 320 NLRB No. 11, slip op. at 18 (December 20, 1995), quoting Price v. Auto Workers UAW, 927 F.2d 88, 93 (1991), cert. denied 112 S.Ct. 295 (1991).

[12] See St. Louis Post-Dispatch, 14-CB-8343, Advice Memorandum dated April 3, 1995, at 5, citing cases.

a 9(a) union's Beck obligations, which can be satisfied by providing at least summaries of its affiliates' major expenditures. See California Saw, *supra*, 320 NLRB No. 11, slip op. at 16-17. Here, no supporting information regarding the Union's affiliates' expenses was supplied and, therefore, this deficiency in the disclosure is violative of Section 8(b)(1)(A).

C. Failure to allocate overhead expenses. The Charging Party asserts that the Union unlawfully categorizes as 100% chargeable "Health and Welfare Insurance" (4.35% of total expenses); "Internal administration of the union" (not listed as expense, but example of chargeable activity given in explanatory notes);[13] "Expenses Allowances" (0.09% of total expenses), "Occupancy Expenses" and many "Administrative Expenses," all listed on page 9 of the disclosure. If the Union fails to allocate overhead, and chargeable activities are thereby likely to be combined with those that are non-chargeable, the Charging Party contends that objectors are entitled to a full rebate of dues expended on overhead.

We have taken the position in the past that if more than de minimus nonrepresentational activities are supported by overhead expenses, the latter must be prorated.[14] Here, "Expenses allowances" is clearly de minimus,[15] while "internal administration of the Union including financial administration and maintenance of the membership status" is merely included in Note C (1) to the disclosure as one of many listed activities which the Union "classified" as chargeable. Note D (1) to the disclosure further states that the Union's principal purpose and expenditures are representational and otherwise germane to collective bargaining, and the Union's expenses "are considered to be one central cost center, the activities of

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[13] This allegation actually involves the adequacy of the Union's disclosure, rather than chargeability, as there is no indication that agency fees are actually spent on these activities. Id. at 8-9.

[14] Id. at 10.

[15] See St. Louis Post-Dispatch, supra at 11, fn. 32, citing cases (less than 5% found de minimus).

which are primarily representational." We conclude that these statements in the disclosure are not unlawful since they are sufficiently clear explanations enable objectors to make informed challenges to the Union's expenditures. We find further support for this conclusion in California Saw, where the Board stated that "mixed" categories of expenditures, which may include both chargeable and nonchargeable items and which are listed as partially chargeable without further explanation, do not breach a union's duty of fair representation where they are not so large as to suggest an attempt to hide nonchargeable expenses in the mixed categories.[16] As to "Health and welfare insurance" and other "Occupancy" and "Administrative" expenses, Note D (7) to the disclosure explains that eligible Union employees are provided with health and welfare benefits which are considered 100% chargeable, so those benefits are like the employee salaries and other office expenses listed on page 9 of the disclosure. The Union apparently uses these employees and some overhead expenses to support its admittedly nonrepresentational activity in which only Union members may participate, i.e. "Local 1150 functions -- net" listed on page 9 of the disclosure. However, this is a de minimus amount of its total expenditures (3.9%), and there is no suggestion that the Union's employees and building/utilities are used for obviously nonchargeable functions like organizing or lobbying.[17] Accordingly, since the various overhead categories listed as 100% chargeable do not support more than de minimus nonchargeable expenditures, the Union did not unlawfully fail to prorate them,[18] and this allegation should be dismissed.

D. Failure to allocate for lobbying. According to the Charging Party, the omission of lobbying expenses from the disclosure is unlawful because such activities are non-chargeable under Ellis v. Railway Clerks, 466 U.S. 435, 453

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[16] 320 NLRB No. 11, slip op. at 17.

[17] The disclosure specifically states that no funds are spent on organizing and, as discussed below, there is no evidence that the Union engages in lobbying.

[18] See St. Louis Post-Dispatch, supra at 10.

(1984). In support of the argument that the Union spends dues receipts on lobbying, the Charging Party relies on parts of a Union newsletter urging members to contact Congress and containing a discussion of the Union's political agenda. However, the Union newsletter does not urge members to contact Congress regarding anything other than procuring helicopters made by their Employer, and the report on a "political agenda" was written for the newsletter by the head of the Connecticut AFL-CIO on that organization's behalf and reflects, at most, lobbying done by a body to which the Union sends a de minimus portion (2%) of its total expenditures. In any event, the Union treats as nonchargeable its publications to the extent they report on nonrepresentational activities (Note D (3) to the disclosure). Since there is no other evidence that the Union engages in lobbying, this allegation should be dismissed.

E. Vague Categories. The Charging Party contends that the following disclosure categories are unlawfully vague in that objectors have inadequate information to determine whether to file a challenge: "economic actions including strike related actions;" "efforts to enhance and maintain a united front, allegiance and commitment among represented employees;" and "activities that initiate and implement the Union as the [bargaining unit] representative." However, these are not items for which expenditures are listed, but rather are three of numerous activities which the Union gives as examples of chargeable activities in Note C (1) to the disclosure. No disclosure item is alleged as impermissibly vague standing alone and, in our view, the foregoing descriptions further clarify what the Union considers chargeable areas: strikes and other economic pressure used against employers; promotion of a united front by the bargaining unit; and preservation of the Union as bargaining representative. If anything, these descriptions, although not limited to specific types of action, provide more than adequate information on which objectors can rely in deciding whether to challenge the disclosure.[19] Finally, we have taken the position that

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[19] Id. at 3 ("any activity designed to increase or preserve the allegiance of represented employees and to safeguard the Union's present representational status" not impermissibly vague); cf. California Saw, slip op. at 17

strike benefits would in any event be chargeable to agency fee payers even if they would not support a strike.[20] Accordingly, this allegation should be dismissed.

B.J.K.

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per (union need only set forth major areas of expenditures to satisfy duty of fair representation).

[20] See Teamsters Local 174 (Associated Grocers), 19-CB-7645, Advice Memorandum dated February 28, 1995, at 10.